KAMPALA INTERNATIONAL UNIVERSITY

LAW JOURNAL

KIULJ Vol.4 Issue 2,2022

KAMPALA INTERNATIONAL UNIVERSITY

LAW JOURNAL

(KIULJ)

KIULJ. VOL 4, ISSUE 2, 2022

KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)

Journal of School of Law, Kampala International University, Kampala, Uganda

ISSN: 2519-9501(Print)

ISSN: 2519-9528(Electronic)

Published by:
School of Law
Kampala International University
P.O. Box 20000 Kampala
Kampala
Uganda

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KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ) is the official journal of the School of Law, Kampala International University. It is a peer-reviewed journal providing distinctive and insightful analysis of legal concepts, operation of legal institutions and relationships between law and other concepts. It is guided in the true academic spirit of objectivity and critical investigation of topical and contemporary issues resulting from the interface between law and society. The result is a high-quality account of in-depth assessment of the strengths and weaknesses of particular legal regimes with the view to introducing reforms. In furtherance of the requirements of advanced academic scholarship, the Journal places high premium on originality and contribution to knowledge, plain and conventional language, and full acknowledgment of sources of information among other things. It is superintended by a Board of respected academics, lawyers, and other legal professionals.

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Scope

Kampala International University Law Journal (KIULJ) is the official Journal of the School of Law, Kampala International University, Uganda. It is a peer-reviewed Journal providing an objective and industry focused analysis of national and international legal, policy and ethical issues. The Journal publishes well researched articles that are in sync with sound academic interrogation and professional experience on topical, legal, business, financial, investment, economic and policy issues and other sectors.

Citation

This Journal may be cited as *KIULJ Vol 4, Issue 2, 2022.*

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FROM THE EDITORIAL SUITE

The primary objective of the **KAMPALA INTERNATIONAL UNIVERSITY LAW JOURNAL (KIULJ)** is to provide as platform for a robust intellectual discourse, through the publication of incisive and insightful articles and other contributions from a variety of scholars, jurists and practitioners across jurisdictions. The desire to accomplish this objective guides the choice of the materials being presented to the reading public in every edition. The peer review and editing processes of the papers that are finally selected for publication are equally influenced largely by the pursuit of this goal.

To this end, articles from seasoned scholars and practitioners in each edition address a wide spectrum of issues from different branches of the law, such as, International Criminal Law, Law of International Institutions, Environmental Law, Human Rights Law, Medical Law, Oil and Gas Law, Constitutional Law, Corporate Governance to mention but a few. You will, no doubt, find these scholarly works a worthy contribution to knowledge in their respective fields.

On behalf of the Editorial Board, I wish to appreciate all our reviewers, internal and external, for their constructive criticisms, comments and suggestions. These go a long way to enrich the quality of the papers published in this Journal. The various contributors who painstakingly addressed the observations and suggestions of the reviewers, thus facilitating the achievement of the purpose of the review process also deserve our commendation.

We also, with a grateful heart, acknowledge the interest our teeming readers have continued to show in the succeeding editions of the journal just as we assure them of our readiness to give them the best always. We equally thank our editorial consultants for their useful advice and comments that have contributed to the continuous improvement of the quality of the journal. Legal practitioners and scholars are hereby informed that contributions to our journal are received on a rolling basis. They should feel free to send in their manuscripts and ensure they comply with the submission guidelines as spelt out in the Call for Papers obtainable from the journal's website (www.kiulj.kiu.ac.ug). All contributions should be addressed to the Editor-in-Chief and forwarded to the email addresses supplied in this edition.

VALENTINE T. MBELI (Ph.D.)

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THE STATUTE OF EXTRAORDINARY AFRICAN CHAMBERS: AN END TO IMPUNITY IN AFRICA?

JOEL A ADEYEYE, Ph.D.[*]

Abstract

In 2012, the Extra-ordinary African Chambers (EAC) were established in the Republic of Senegal with the mandate of prosecuting the former Chadian Head of State, Hissene Habre, for eight years of international crimes committed in his country from 1982-1990. The EAC breaks new ground on international criminal justice in Africa in several ways. The Habre trial represents the first trial by an African state of a former head of state of another African state. As the first internationalized tribunal to have been established with the involvement of the African Union, the EAC also provided valuable insight into what a regional approach to internationalized justice may look like. The Chambers jurisdiction covers genocide, crimes against humanity, war crimes and torture, setting a precedent as an international criminal tribunal exclusively on the basis of universal jurisdiction. This article looks at a number of legal issues raised by the establishment of the EAC including but not limited to its compositions, jurisdictions, powers and the compensation for the victims of human and humanitarian right abuses.

Keywords*:* Extraordinary African Chambers, Impunity, African Solution to African Problem, Corruption, International Criminal Trials

Introduction

Since the cold war ended, Africa has frequently been the site of severe human rights violations, including many that were perpetrated or directed by a national government against its own citizens.[1] Governments that commit such atrocities do not do so lightly. Powerful motivations lie behind their 'preferences for repression,' which is a tool that they employ to retain political power, secure and distribute resources, and ultimately ensure their regime's survival.[2] When this is the case,

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[1] Adam Keith, 'The African Union in Darfur: An African Solution to a Global Problem?, ?[2007] (18) *Journal Of Public and International Affairs,* 148 < https://jpia.princeton.edu/sites/jpia/files/2007-7.pdf> accessed 25 April 2020.

[2] Emilie. Hafner-Burton, Trading Human Rights: How Preferential Trade Agreements Influence Government Repression [2005] *International Organization* 593-629< https://www.cambridge.org/core/journals/international-

changing an abusive regime's behavior will require significant pressure, whether through diplomatic criticism, economic sanctions, or humanitarian military intervention. The record suggests that this kind of action may not always be forthcoming from those with the greatest influence.

When Idriss I. Déby took power in December 1990, one of his first actions as President was to create a Commission of Inquiry into the crimes and misappropriations committed by ex-President Hissene Habré, his accomplices and/or accessories.[3] After five months of investigations, the Commission issued its report in May 1992.[4] The report concluded that Habré's regime led to –'more than 40,000 victims, more than 80,000 orphans, more than 30,000 widows, more than 200,000 people left with no moral or material support as a result of this repression'.[5] The Commission also identified the international support of Habré's regime.[6] However the Habré regime had some positive aspects: Habré appeared to be good administrator and achieved some economic success for his country. As scholar Robert Buitjenhuijis described, only his discriminatory and repressive policies led to his political failure.[7] Despite this, the Commission recommended prosecution of those involved in the crimes. As a result, in 2008, Hissene Habré was prosecuted *in absentia* in Chad and sentenced to death.[8] In the years that followed, Chad failed to secure his extradition from Senegal and the enforcement of his sentence.

At the same time, inspired by the Pinochet case, in which a Spanish court exercised universal jurisdiction to hear a case brought against the former Chilean dictator,[9] civil society groups intensified their efforts to try Habré in Senegal. Led by Human Rights Watch, they filed an application before the Senegalese court in January 2000. Habré was subsequently indicted, and his lawyers challenged the criminal prosecution. In April 2000, Senegalese Court of Appeal of Dakar dismissed the

organization/article/trading-human-rights-how-preferential-trade-agreements-influence-government-repression/BAF0F89BFF640874AB50E6AB55EB966D> accessed 25 April 2020.

[3] Roland Adjovi, 'Introductory Note to the Agreement on the Establishment of the Extraordinary African Chambers within the Senegalese Judicial System between the Government of the Republic of Senegal and the African Union and the Statute of the Chambers' ?[2013] (52) *ILM* 1020< http://rolandadjovi.net/research-publications> accessed 20 April 2020.

[4] ibid.

[5] ibid.

[6] *Accord de Cooperation Militaire Technique, Fr-Chad*, June 19, 1976 <http://www.diplomatie.gouv.fr/affichetraite.do?accord=TRA19760067> accessed 20 April 2020.

[7] ibid.

[8] ibid.

[9] Steve Czajkowski,' Chad Court sentences ex-dictator Habre to death in Absentia' *JURIST* (August 16, 2008) <https://www.jurist.org/news/2008/08/chad-court-sentences-ex-dictator-habre/> accessed 20 April 2020.

indictment, finding a lack of jurisdiction.[10]The ruling was confirmed by *Cour de Cassation*, the highest court within the Senegalese Judiciary.[11]

Following the result in Senegal, the civil society groups applied to the Committee against Torture in April 2001 for violations of the Convention against Torture. The Committee issued a decision on May 17, 2006, that granted the application and recommended that Senegal take appropriate action to implement the Convention in its domestic law and comply with its obligation to extradite or prosecute.[12] At the same time, in December 2001, a group of victims filed an application in Belgium under the Belgian universal jurisdiction Act.[13] This judicial avenue led to extensive exchanges between Senegal and Belgium regarding extradition, resulting in a case before the International Court of Justice (ICJ).[14] On July 20, 2012, the ICJ found that:

> the Republic of Senegal, by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by Mr. Hissène Habré, has breached its obligation under Article 6, paragraph 2, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984'; that 'the Republic of Senegal, by failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, has breached its obligation under Article 7, paragraph 1, of the United Nations Convention against Torture….'; and that 'the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.[15]

Under increasing international pressure, in 2005, Senegal reported the case of Hissène Habré to the AU for an African solution. In January 2006, the Assembly of Heads of State and Government of the AU established an expert committee to

[10] Introductory Note: In *re Augusto Pinochet Ugarte* in 119 I.L.R. 1(ElihuLauterpacht. C.J. Greenwood & A.G. Oppenheimer, eds, Aug, 2002) <https://userpages.umbc.edu/~davisj/pino.html> accessed 20 April 2020.

[11]*Ministere Public v. Hissene Habre*, Courd'appel [CA] [regional court of appeal] Dakar, eh. d'accusation. Chambred'accusation, Arret No. 135 [Apr. 7, 2000] (Sen)
<http://curia.europa.eu/juris/showPdf.jsf?docid=95762&doclang=EN>accessed 20 April,2020.

[12]*Souleymane Guengueng v. Hissene Habre*, Cour de Cassation [Cass] [Supreme Court for judicial matters] crim., Arret No. 14 [March 20, 2001] (Sen). <https://www.hrw.org/reports/2005/chad0705/3.htm> accessed 20 April 2020.

[13] Committee against Torture, Decisions of the committee Against Torture under Art. 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. CAT/C/36/D/181/2001 [May 19, 2006] <https://www.ohchr.org/EN/HRBodies/CAT> accessed 20 April 2020.

[14] The application was based on the 1999 Act. Loi relative a la repression des violations graves de droit international humanitaire [Law on the repression of serious violations of international humanitarian law] of Mar. 2 1999 [Belgium]. <https://www.jstor.org/stable/3133702> accessed 20 April 2020

[15] Obligation to Prosecute or Extradite (*Belgium v. Senegal*), Application Instituting Proceedings [19Febuary, 2009] <https://www.icj-cij.org/en/case/144/institution-proceedings> accessed 20 April 2020.

advice on the situation. The resulting Report was discussed during the following Summit and the AU mandated Senegal to try Habré on behalf of the continent.[16] In response, and with the plan to organize the trial, Senegal amended its domestic law,[17] but Habré complained to the Economic Community of West African States (ECOWAS), Community Court of Justice about the retrospective nature of the new legal framework. The Court found a retroactivity problem, holding that the new laws violated Habré's rights. The Court also held that Senegal could legally try Habré only before an international or hybrid court.[18] In parallel, a former Minister of Habré, filed a case before the African Court on Human and Peoples' Rights, against Senegal, alleging, various violations of Habré's rights; however, the case was dismissed for lack of jurisdiction because Senegal has not made the declaration under Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights establishing the Court which would have allowed individuals and civil society organizations to bring cases against it.[19] The ECOWAS Court judgment led the Government of Senegal to engage in negotiations with the AU for an alternative solution. The agreement signed on August 22 2012, is the result of these negotiations. The Agreement includes the Statute of the EAC that provides the operational criminal code for prosecution.

The Concept of African Solutions to African Problems

Underlying the concept of African renaissance is the growing recognition and determination by Africa to find African solutions for African problems.[20] The sentiment is well reflected in the African Union Constitutive Act and its Protocol on Peace and Security Council, which reaffirm the determination of Africa to be a

[16] Obligation to Prosecute or Extradite *(Belgium v. Senegal)*, Judgment, 128 (July 20, 2012) <https://www.icj-cij.org/en/case/144> accessed 20 April 2020.

[17] AU Decision on the Hissene Habre Case and the African Union, AU Doc, Assembly/AU/ Dec. 103 (VI) (Jan. 2006)< https://au.int/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf > accessed 20 April 2020; (establishing the committee and requesting that its report be submitted in July 2006): Decision sur le Process D'HisseneHabre et L'Union Africaine, AU Doc, Assembly/AU/ Dec.127 (VII)(July 2006). <https://au.int/sites/default/files/decisions/9651-assembly_au_dec_416-449_xix_e_final.pdf> accessed 21 April, 2020; the Republic of Senegal to prosecute and ensure that Hissene habre is tried, on behalf of AU, by a competent Senegalese court with guarantees for fair trial.

[18]Loi No. 2008-23 du 25 juillet 2008 de portant insertion d'un article 664 bisdans le Code de Procedure penale [Law 2008-23 of July 25 on the insertion of Article 664 bis the code of Criminal Procedure], JOURNAL OFFICE DE LA REPUBLIQUE DU SENEGAL [J.O.]. July 25, 2008 (Sen). <https://github.com/steeve/france.code-procedure-penale/commit/bc67f4cd7af70364662f81788b5c2b2ab6034b97> accessed 20 April 2020. Constitutionnelle No, 2008-30 du 7 aout 2008 de modifiant les articles 7, 63, 68, 71, et 82 de la Constitution [Law 2008-30 0f august 7 amending Articles 7, 63, 68, 71, and 82 of the Constitution], [J.O.], Aug.7, 2008 (Sen) <shttps://au-senegal.com/IMG/pdf/Constitution-senegal-2008.pdf> accessed 20 April 2020.

[19]*Hissein Habre v. Republic of Senegal*, Case No. ECW/CCJ/APP/07/08. Judgment, 61 (Econ. Community of W. Afr. States [ECOWAS] Community Court of Justice 10, November 2010) <https://au-senegal.com/IMG/pdf/Constitution-senegal-2008.pdf> (accessed 20 April 2020.

[20] Charles R Majinge, 'The Future of Peacekeeping in Africa and the Normative Role of the African Union' [2002] 2 *Goettingen Journal of International Law* 463-500. <http://www.gojil.eu/issues/22/22_article_majinge.pdf > accessed 20, April, 2020.

master of its own destiny.[21] Nowhere has the vision of Africa solutions for African problems been more challenged than in the peace and security realm. The AU has struggled to mobilize resources to address various security challenges with minimal success.[22] From Somalia to Darfur, the organization is increasingly looking towards the international community to provide resources to match the preponderance of the security challenge on the continent. It is this inability of the organization to secure peace and stability on the continent on its own which provides a reality check on the practicability of the concept of African solutions for African problems.[23]

The endeavour of putting the concept of African solutions for African problems into practice has not been an exclusive challenge of the AU only. Instead even regional peacekeeping efforts undertaken under the auspices of ECOWAS and Southern African Development Community (SADC) have faced similar challenges. For example, despite the commendable work of ECOWAS Mission in Sierra Leone and Liberia, the security council had to approve UN led and much resourced missions in both countries United Nations Mission in Sierra Leone (UNAMSIL and United Nations Mission in Liberia (UNAMIL for Sierra Leone and Liberia reflectively).[24] The same can be said of Democratic Republic of Congo where after a brief intervention by SADC, the UN approved MONUC as the primary organ to secure peace and stability in this war ravaged country.[25] As such realizing the concept of African solutions for African problems is a challenge to both regional organizations and the AU itself.[26]

At least three factors have guided the transition to 'African Solutions for African problems.'[27] First, African states prefer to solve their own problems and reduce the influence of external actors in continental affairs. Second, Western states initiated a withdrawal from African conflict management after the disasters in Somalia and Rwanda leaving a vacuum for African contingents to fill.[28] Third, the rise of African sub-regional hegemony provided the jumpstart sub-regional international organizations required to mandate and field peace operations forces.[29]

[21] ibid.
[22] ibid.
[23] Christian Wyse, 'The African Union's Right of Humanitarian Intervention as Collective Self-Defence' [2018] 19 *Chicago Journal of International Law* 299, 309. <http://cjil.uchicago.edu/publication/african-union%E2%80%99s-right-humanitarian-intervention-collective-self-defense> accessed 20 April 2020
[24]Majinge (n 20).
[25] ibid.
[26] ibid.
[27] Terry M Mays, 'African Solutions for African Problems: The Changing Face of African-Mandated Peace Operations' [2003] (23) (1)< https://www.erudit.org/en/journals/jcs/2003-v23-n1-jcs_23_2/> accessed 20 April 2020
[28] ibid.
[29] ibid.

There is a preference among African states for 'African solutions to African problems.'[30] The Charter of the Organization of African Unity (OAU) stated that members should 'Try Africa First' when appealing to an international organization for conflict management assistance. External military interventions on the continent, even under the banner of the UN, tend to bring non-African political influence and its associated problems to the continent.[31]\

The UN fielded one of its first peace operations, the UN operation in the Congo (ONUC) in 1960. The mission proved to be a very costly attempt to solve the many ethnic differences in the Congo and to this day more peacekeepers died in ONUC than in any other UN peace operation. The experience resulted in reluctance for UN peacekeeping on the continent for 25years. African states proved to be reluctant and/or unable to help themselves by organizing peace operations with continental assets. Major General Martin Luther Agwai, the former Deputy Force Commander of the United Nations Assistance Mission in Sierra Leone (UNAMISL), informed participants at a July 2001 meeting on the 'Future of Peace Operations,' that African states want to participate in peace operations on the continent. However, many are not able to deploy peacekeepers because they require logistical and financial assistance to accomplish the task.[32]

International Criminal Trials to the Rescue?

With the failure of national governments, to bring to book perpetrators of evil in a given state especially of crimes against humanity, international community has to adopt a number of measures to bring these perpetrators to account. The earliest standards for wartime behavior have their roots in multinational events centuries prior to the two world wars.[33] From 1618 to 1648 forces representing a large proportion of European nation participated in the Thirty Years War.[34]During the war, only personal morality governed the behavior of soldiers. The state of Germany after the conclusion of the war provided compelling testimony to the lawlessness, this lack of regulation encouraged countryside battle sites were left destroyed and the population of Germany reduced from an original twenty million to an estimated sixteen to seventeen million.[35] The political consequences of the war included a decrease in the power of the Holy Roman Empire, individual nations attempted to

[30] David J. Francis, *Uniting Africa: Building Regional Peace and Security System* (Ashgate Publishing Limited, 2005) 7< https://www.jstor.org/stable/20202831> accessed 20 April 2020.
[31] ibid.
[32] Mays (n 27).
[33] Katie A Welgan, 'The Nuremberg Trials and Crimes against Humanity' [2014] *Young Historians Conference* Portland State University <http://pdxscholar.library.pdx.edu/younghistorians/2014/oralpres/8> accessed 21 April 2020.
[34] ibid.
[35] Richard Holmes and others, *The Oxford Companion to Military History* (Oxford University Press, 2001) <https://www.amazon.com/Oxford-Companion-Military-History/dp/019866209> accessed 21 April 2020.

take advantage of this power vacuum by building larger armies to increase their own military strength.[36] Soldiering soon became a profession, and this increased volume of full-time fighters made strict organization necessary for productivity.[37] Thus, both humanitarian and logistical concerns motivated European leaders after 1648 to establish regulated militaries. In addition to superficial changes in organization, including the establishment of standard national uniforms, leaders set standard for behavior and created procedures and personnel positions for the enforcement of these regulations. Nations established customs for the treatment of civilians during conflict, and while not yet incorporated into international law, these standards came to be viewed as 'sensible' military practice.[38]

Enlightenment-era philosophy also supported the concept of civilian immunity in times of international conflict. Dutch legal philosopher Hugo Grotius authored his 1625 work *De Jure Belli ac Pacis* (on the Laws of War and Peace), in the midst of the Thirty Years. Grotius turned to Roman military history and Christian religious doctrine to argue for limitations on wartime violence, including 'unnecessary violence in the taking of towns' leading to the loss of 'great numbers of the innocent.'[39] In 1762, Jean-Jacques Rousseau's on social contract asserted that war represents a conflict between states rather than individuals. Because the individual is not a party to military conflict, and war only justifies destructive actions which serve a purpose in the dispute, Rousseau argued that 'a just price…respects the purpose and property of private individuals' and those not acting as 'instruments of the enemy.'[40] Although this soldier-civilian distinction may have developed first in scholarly circles, European military leaders eventually embraced this new military philosophy. French foreign minister Charles Maurice de Talleyrand-perigord shared a paraphrased version of the pertinent passage of on social contract with Napoleon in an 1806 letter; upon a later 1871 invasion of France, the Prussian king announced his intention to oppose French soldiers rather than the people.[41]

Although both philosophers and military leaders worldwide discouraged violence against noncombatants, no codified national or international law included this precept until two military conflicts during the nineteenth century. During the U.S Civil war, Columbia Professor Francis Lieber prepared 'Instructions for the

[36] ibid.
[37] ibid.
[38] Telford Taylor, *The Anatomy of the Nuremberg Trials* (Little Brown and Company, 1992) 6. <https://www.goodreads.com/book/show/841913.The_Anatomy_of_the_Nuremberg_Trials> accessed 21 April 2020.
[39] Hugo Grotius, *On the Law of War and Peace*, trans A.C. Campbell (np., 1814) <https://www.amazon.com/Law-War-Peace-Hugo-Grotius/dp/1976502187> accessed 21 April 2020.
[40] Alan Ritter and Julia C Bondanella (eds) *Rousseau's Political Writing* (WW Norton and Company, 1988) 92. <https://www.biblio.com/9780393956511> accessed 21 April, 2020.
[41] ibid.

Government of Armies of the United States in the Field,' Later known as the Lieber Code, to serve as a handbook for the Union Army. This document, which outlined the rights of both combatants and civilians, represented the first codification of humanitarian military law.[42] Notable in the U.S judge Advocate General's interpretation of the code is a rejection of any *ex post facto* accusations from soldiers accused of violating its regulations. Referring to the consensus in customary law against the crimes outlined in the document, the Judge Advocate General characterized the code as 'merely a publication and affordance of the law as it had previously existed.'[43] Thus, while the Lieber Code was novel in its status as a written document, the familiar nature of the ideas it represented justified its enforcement. While the code applied only to the U.S military, Richard Baxter suggests that this first codification of war law inspired the development of similar codified regulations in multiple European nations within the next century.[44] Perhaps also contributing to the push for firm military laws were the Crimean and Franco-Austrian wars, fought on the European continent several years prior to the U.S Civil War. Because no laws existed to ensure the protection of medical staff on the battlefield, doctors could not properly assist wounded soldiers during these two conflicts.[45] During one of the earliest international conferences on war law, twelve European nations signed the first Geneva Convention, which provided the privileges of neutrality to hospital employees, ambulance staff, and any civilians who chose to assist the wounded.[46]

The Hague Convention of 1899 represented the final development in international war law prior to World War I. Drawing heavily from precepts first outlined in the Lieber Code; the 'Convention with Respect to the Laws and Customs of War on Land'[47] ensured additional protections to civilians in war zones.[48] The Convention forbade collective punishment, the establishment of penalties against the general population for a crime for which only select members are responsible. Other articles of the document denounced attacks against undefended towns and the pillaging of captured areas.[49]Signatories to the convention included major North American, European, and Asian forces. Despite this broad coalition, Telford Taylor suggests

[42]Welgan (n 33), 4.
[43] Jordan J Paust 'Dr Francis Lieber and the Lieber Code' (2001) *Proceedings of the Meeting: American Society of International Law* 114.< https://www.jstor.org/stable/25659438> accessed 21 April 2020
[44] ibid.
[45] ibid.
[46] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *The Avalon Project, Lilian Goldman Law Library*< https://avalon.law.yale.edu/20th_century/geneva04.asp> accessed 21 April 2020.
[47]Convention with Respect to the Laws and Customs of War on Land (The Hague, II) (29 July 1899) Entry into Force: 4 September 1900 <https://avalon.law.yale.edu/19th_century/hague02.asp> accessed 21 April 2020.
[48]Welgann (n 33).
[49] Convention with Respect to Laws and Customs of War on Land, *The Avalon Project, LIlian Goldman Law Library*< https://avalon.law.yale.edu/19th_century/hague02.asp> accessed 21 April 2020.

that the convention's failure to define any means of enforcement for the regulations itself diminished its practical impact.[50] However, similar to the Lieber Code in both its content and influence, the Hague Convention did spur individual nations to incorporate humanitarian concepts into their own military legal codes.[51]

The violence of World War I provided the first major test of the national and international war laws developed in the previous two centuries for the protection of noncombatants. Several developments in military technology facilitated violence against civilians beyond the scope of the Hague protections. Germans began Zeppelin air raids over London, a technically "defended" town therefore excluded from the Hague protection, killing over two hundred civilians in 1915alone.[52] Germans also initiated unannounced attacks on merchant ships in the waters surrounding the British Isles using new U-boat submarines; the Hague Convention of 1899 did not prohibit such attacks unless the targeted ship served as a hospital. In Eastern Europe, leaders of the Ottoman Empire, a German ally, pursued a racial cleansing agenda strikingly similar to Nazi activities which would occur decades later. Fueled by a long-standing conflict between the Christian Armenians and the Muslim government, Ottoman leaders cited perceived Armenian sympathy with the Russian enemy to justify state-sponsored genocide. Mass executions and unhealthy conditions in concentration camps reduced the Ottoman-Armenian population from approximately 2.5 to 1.5 million.[53] While allied officials recognized the extent of this violence, condemning Ottoman actions as 'crimes against humanity and civilization,' the narrow scope of The Hague Convention again rendered international law powerless in preventing further damage.[54] Because the Armenians were Ottoman citizens, and not a separate belligerent nation, no Hague protections applied to them.[55]

While some instances of German aggression circumvented the limitations of the Hague Convention, others more clearly violated international law. Reports indicated that German armies pillaged the city of Louvain in neutral Belgium and took civilian hostages in other areas; Europeans began to refer to the invasion and occupation as 'the rape of Belgium'.[56]A commission of the Paris Peace Conference tasked with

[50] ibid.
[51]Taylor (n 38), 6 .
[52] ibid.
[53] Jan Palmowski *A Dictionary of Contemporary World History* (3rd ed. Oxford University Press, 2008) <https://www.oxfordreference.com/view/10.1093/acref/9780199295678.001.0001/acref-9780199295678> accessed 21 April 2020.
[54] Taylor (n 38).
[55] ibid.
[56] Wim Klinkert' The Rape of Belgium: The Untold Story of World War 1' Review of the Rape of Belgium: The untold Story of World War 1 by Larry Zuckerman, [2006] 6 *The Journal of Military History*, <https://www.amazon.com/Rape-Belgium-Untold-Story-World/dp/0814797040> accessed 21 April 2020.

evaluating the legality of Central Power actions issued a 1919 report which asserted that German forces had violated the laws of war and called for an international tribunal to determine the guilt of the most powerful military leaders. The first international war crimes court may have occurred the next year if not for the objections of US President Woodrow Wilson, who feared that one such court would represent a form of victor's justice. Instead, the Treaty of Versailles arraigned German Kaiser Wilhelm II not for war crimes but for a vague 'offence against international morality and the sanctity of treaties'.[57]The treaty called for military tribunals to try all suspected German offenders, but the German government eventually convinced the Allies to permit the German Supreme Court to hear the cases. The 1921 Leipzig trials evolved into a "great fiasco," with many acquitted and those convicted allowed neglecting their sentences.[58]The Kaiser, who sought asylum in Holland in 1918, avoided the trials entirely. Similarly ineffective were the Ottoman Court Martial Trials of 1919 to 1920, ordered by the British during their occupation of Constantinople after the conclusion of the war.[59] The indictment against top Ottoman officials supported government involvement in the Armenian massacres with forty-two different documents.[60] Despite this compelling collection of incriminating evidence, Winston Churchill agreed to abandon the trials in exchange for the freedom of British prisoners of war held in Turkey.[61]

The Leipzig and Ottoman Trials failed to punish German and Armenian officials for wartime violence against civilians, but succeeded in publicizing the extent of the atrocities permissible under existing international statutes. The trial of Lieutenant Carl Neumann, a German U-boat commander, received coverage in numerous American newspapers.[62]Although the Leipzig court acquitted the defendant because he had followed superior orders, the officer revealed that the Germans had given

[57]Michael R. Marrus *The Nuremberg War Crimes Trial 1945-1946 Documentary History* (Bedford Books, 1997) 242 <https://www.amazon.com/Nuremberg-War-Crimes-Trial-1945-46/dp/1319094848> accessed 21 April 2020.
[58] Arieh J Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (The University of North Carolina Press, 1999) <https://www.amazon.com/Prelude-Nuremberg-Allied-Question-Punishment/dp/0807857181> accessed 21 April 2020.
[59] ibid.
[60] David P Forsythe *Encyclopedia of Human Rights* (1st edn Oxford University Press, 2009) Armenians in the Ottoman Empire. <https://www.oxfordreference.com/view/10.1093/acref/9780195334029.001.0001/acref-9780195334029> accessed 21 April 2020.
[61] ibid.
[62]Arno D Fleurot 'Trial of German Criminal is Farce' *The Oregonian* 5 June 1921, America's Historical Newspapers (11D63E4ECB789D70).< https://oregonnews.uoregon.edu/lccn/sn83025138/1921-06-23/ed-1/seq-20/> accessed 21 April, 2020.; A D Fleurot, 'First German War Criminal Arraigned Convicts Himself' *The Philadelphia Inquirer,* May 25, 1921, America's Historical Newspapers (1165DF483849CA40). <https://furtherglory.wordpress.com/2011/11/21/german-war-criminals-convicted-by-the-american-military-tribunal-at-dachau/> accessed 21 April 2020 ; H Wendel, 'Leipzig Trials a Disgrace' *The Kansas City Star,* October 11, 1921, America's Historical Newspapers (1195E48A6D42DA60). <https://www.alamy.com/stock-photo-defendants-of-the-war-crimes-trials-in-leipzig-1921-48393605.html >accessed 21 April 2020 ;'Acquit a U-Boat Commander' *The Kansas City Star,* June 4, 1921, America's Historical Newspapers (11931A708A162B28). <https://www.readex.com/content/americas-historical-newspapers >accessed 21 April 2020

'explicit orders to sink British hospital ships'.[63]The exposure of similar acts of aggression received in the press, coupled with the failure of the Leipzig and Ottoman Trials to effectively punish the perpetrators, exposed a need for additional legal protections for noncombatants in future conflicts. In response, an international group of delegates at the 1922 Washington Conference drafted, yet failed to force into adoption, an agreement against bombings intended primarily to inspire civilian fear. In an attempt to prevent casualties from unannounced submarine attacks, the eleven signatories to the 1930 London Treaty agreed to prohibit the destruction of merchant vessels unless the attacking captain gave passengers time to escape to safety.[64]

The Nuremberg Trials

Just as World War I technology precipitated violence against civilians beyond the scope of The Hague protections, a change in German military goals led to unprecedented brutalities during World War II. Taylor argues that while the German leaders of World War I targeted civilians in the pursuit of military victory, the Nazi leaders of World War II endeavored to oppress select ethnic groups with violence unconnected to military goals.[65] The publication of the Nuremberg Laws, which revoked the German citizenship of Jewish residents and prohibited intermarriage between Jews and Germans, presents evidence of this disconnect. Announced at a 1935 Nazi Party rally, prior to the start of official military conflict in 1939, the code suggests that Nazi oppression of Jews was politically motivated and not a means to any larger wartime goal. The brutalities of 1938 Kristallnacht, which included the murder of at least ninety-one Jews and the placement of approximately thirty thousand in concentration camps before the start of World War II, similarly present Nazi anti-Semitism as unrelated to the pursuit of military victory.[66] Nazi abuses against civilians continued into World War II with the German occupation of Poland. Leaders forced the Jewish population to move into ghettos outside of main cities, while, according to a report by Polish Primate August Cardinal Hlond, other Nazi officials were tasked with the execution of two hundred and fourteen Polish Catholic priests. Statements issued by numerous world leaders indicate that Allied officials were aware from the beginning of the war of Nazi violence against noncombatants. The Polish government, existing at the time in exile in London, first suggested the punishment of German war criminals in 1940. The following year, President Roosevelt and Prime Minister Churchill issued statements condemning Nazi murders of 'scores of innocent hostages' and promising unspecified

[63]Fleurot, ibid.
[64] ibid.
[65] Taylor (n 3.
[66]Palmowski (n 53).

'retribution.'[67]The first official Allied document on war crimes came in 1942 as a product of the Inter-Allied Commission on the Punishment of War Crimes. The commission's St. James' Declaration stated that the Allied powers intended to systematically and justly punish those involved in the perpetration of wartime crimes. Yet notable in the commission's justification of this intention is its appeal not to codified international law, but to 'the sense of justice of the civilized world.'[68]As Arieh Kochavi notes, existing international law did not include provisions to support punishment for many instances of Nazi violence against civilians. The prohibitions of the Hague Convention applied only to violence against citizens of another belligerent nation; the document thus did not apply to brutalities perpetrated by Nazis prior to the war against German citizens. Allied leaders did view these actions as blatantly wrong, but the commission's desire to pursue punishment 'through the channel of organized justice' meant that Allied lawyers would need to condemn these crimes against humanity using concepts from existing international law and legal philosophy.[69]

Harvard law professor Sheldon Glueck provided this critical link between existing legal custom and the seemingly novel concept of crimes against humanity. Glueck worked as a translator during German interrogations prior to the Leipzig trials; the failure of these judicial proceedings likely familiarized him with the shortcomings of existing international law. A legal realist, Glueck viewed law as a body of rules whose interpretation could vary based on political and moral concerns. Thus, both Glueck's background and liberal legal philosophy may have informed his decision to express support for the legal validity of crimes against humanity during his 1943 Harvard seminar on war crimes.[70]Referring to centuries of legal precedent in both national and international law against harming civilians, Glueck asserted that 'the laws of civilized humanity' justified an explicit condemnation of German crimes against humanity in international law. According to Glueck, the Allies could reasonably assume that, as citizens and members of the military, Nazi criminals had knowledge of these common laws prohibiting crimes such as murder and torture.[71] While Glueck recognized that the prohibition of state sponsored violence against a country's own citizens was unprecedented in these laws, he believed it unreasonable to base the legality of violence singularly on the nationality of the victims. Glueck also cited basic morality in his argument, claiming that because Nazi leaders must have understood 'full well that murder is murder' before committing acts of brutality

[67]ibid.
[68] ibid.
[69] Taylor (n 38).
[70]John Hagan and Scott Greer, "Making War Criminal," [2002] 2 *Criminology* 40,237, <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2002.tb00956.x> accessed 21 April 2020.
[71] ibid.

against civilians, indicting these leaders for crimes against humanity would not constitute the enforcement of *ex post facto* law.[72]

While Glueck did teach and write extensively on the subject of World War II war crimes, his presence at a number of meetings tasked with the formulation of the Nuremberg Charter principles most directly suggests the influence of his legal philosophy. Glueck testified before the United Stated Congress on the nature of war crimes, then in 1942 served as a corresponding member of the London International Commission on the Trial of War Criminals. In 1945, Glueck attended negotiations on the London Charter itself, serving as the advisor to U.S. Justice Robert Jackson. Shortly after, Article 6(c) of the London Charter officially defined 'Crimes against Humanity' as a crime under the International Military Tribunal.[73] In justifications of the inclusion of this new charge, legal leaders at the Nuremberg Trials further underscored the influence of Glueck's legal philosophy. Both Justice Jackson, who became the chief prosecutor for the United States, and Hartley Shawcross, the British chief prosecutor, echoed elements of Glueck's legal theory when defending the legitimacy of crimes against humanity. In a correspondence to Allied leaders, Jackson appealed to Glueck's concept of the consensus against basic crimes in civilized society, referring to Nazi crimes against citizens as 'acts ... regarded as criminal since the time of Cain'.[74] Offering a closing argument 36 during the trials, Shawcross cited Glueck's belief that the nationality of a victim of violence should not alter the legal permissibility of brutality.[75]

The London Charter's prohibition of crimes against humanity drew from centuries of customary and codified legal precedents protecting civilians during times of war. While new to the body of official international law, this condemnation represented the next logical step in a pattern of war law development spanning several centuries. From the emergence of larger armies after the Thirty Years War to the development of new weapons technology during World War II, each advance in military power made necessary a commensurate increase in the ability of international law to limit this power.[76] Viewed in this context, Glueck's decision to make the minor logical leap from previous humanitarian law to the legal legitimacy of crimes against humanity appears as the most desirable of two undesirable choices: to face accusations of enforcing *ex postfacto* law, or to allow Nazi actions unprecedented in their brutality to go unchecked. In a sense, all international war law, which limits national sovereignty to prevent unregulated violence, represents the lesser of two

[72] ibid.
[73] Marrus (n 57).
[74] Hagan and Greer (n 76).
[75] Marrus (n 63).
[76] ibid.

evils. While the inclusion of crimes against humanity into international law at Nuremberg aroused controversy in the years immediately following the trial, legal experts nevertheless included the concept in the 1998 Rome Statute of the International Criminal Court. Because it attempts to impose moral regulations on an inherently immoral endeavor, international war law can never reach perfection. But as the one hundred and sixty signatories to the Rome Statute affirmed in 1998, even controversial developments can eventually constitute significant improvements.[77]

Over the past two decades, international criminal law has been increasingly institutionalized and has become one of the dominant frames for defining issues of justice and conflict resolution.[78] Indeed, international criminal law is often presented as the road towards global justice. Human longing for justice stands in a paradoxical relation to the institutional practices designed to satisfy this desire. While the ideals of justice need institutional translation in order to be effective, the very same institutionalization may corrupt the ideals that we hold dear.[79] The implication is that because positive laws and institutions are imperfect articulations of justice at best, they should always be open to contestation and revision. Specifically, existing institutions need to leave room for alternative articulations of justice and thus refrain from attempts to monopolize discourses on justice.[80]

The caution against the monopolization of discourses is even more pertinent when claims are made in the name of 'global justices'. Adding the adjective 'global' implies that something bigger and higher is at stake than in the case of 'local', 'ordinary' or 'national' justice. In the case of global justice, the issues concerned transcend the values, institutions and interests of directly affected communities. The promotion of global justice is invoked as a justification for interventions by outside agents acting in the name of the values and interests of a cosmopolitan community. However, the global society in which global justice is supposed to operate is even more pluralist than its domestics or sub national counterparts. Within the pluralist global society, numerous articulations of justice coexist, overlap and compete.[81] Conceptions of global justice that effectively silence or marginalize alternative interpretations of what is just are therefore deeply problematic (just like 'non-global' conceptions of justices that do the same). Defining social-political issues in terms of

[77] ibid.
[78] Sarah M H Nouwen and Wouter G Werner 'Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity' [2015] (13) *JICJ* 157-158< https://academic.oup.com/jicj/article-abstract/13/1/157/810288/> accessed 22 April 2020.
[79] ibid.
[80] ibid.
[81] Kennan Ferguson and William James, *Politics in the Pluriverse* (Roman & Littlefield Publishers 2007) <https://books.google.com/books/about/William_James.html?id=UbzcSUgv2HgC accessed 22 April 2020.

'global' requires openness to the various alternative articulations of justices that could be longed for, experienced and struggled for in the situations at hand.[82]

The International Criminal Court (ICC) and Tribunals

Of the various justifications for international criminal justice, the Preamble of the Rome Statute establishing and governing the permanent International Criminal Court (ICC) also reflects the rationale of protecting diversity, acknowledging as it does the existence of a pluralistic humanity in the form of people **...** united by common bonds, their cultures pieced together in a shared heritage, while expressing concern 'that this delicate mosaic may be shattered at any time' by 'unimaginable atrocities that shock the conscience of mankind'. At least part of the rationale for the establishment of the ICC is thus to achieve accountability for crimes that constitute an attack on the idea of a pluralistic humanity. Through the prosecution of some of the crimes within its jurisdiction, the ICC is to promote and protect diversity.

Arendt's justification for international criminalization of certain conducts is one among many and cannot be regarded as the justification for international criminal law.[83] However, its acceptance as one of the rationales for international criminal law denotes important boundaries for international criminal law itself. It implies that international criminal law, irrespective of its other rationales, should itself never undermine the fundamental aim that it is meant to promote: the protection of diversity.[84]

To be sure, we do not directly attribute this argument to Arendt, for whom the need to protect human diversity mainly functioned as a justification for international criminal law.[85]However, now international criminal law has established itself as one of the dominant frames through which political conflicts are read, it is necessary to rethink the relation between international criminal law and the need to protect human diversity. May it also be the case that international criminal law is

[82] ibid.
[83] Massimo Renzo 'Crimes Against Humanity and the Limits of International Criminal Law [22012] (31) *Law and Philosophy* 443-449< https://link.springer.com/article/10.1007/s10982-012-9127-4> accessed 22 April 2020.
[84]D Luban, 'Hannah Arendt as a Theorist of International Law' [2011] (11) *International Criminal Law Review* 621-641 <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1618&context=facpub> accessed 22nd April, 2020; L May 'Crimes Against Humanity': A Normative Account (Cambridge University Press, 2004) <https://www.amazon.com/Crimes-against-Humanity-Normative-Philosophy/dp/0521600510> accessed 22 April 2020.
[85] S Benhabib 'International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin' [2009] (16) *Constellations* 331-350 <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1467-8675.2009.00545.x > accessed 22 April 2020.

endangering the very plurality it is meant to protect?[86] We argue that there are indeed signs that international criminal law runs the risk of undermining one of its own foundations. This paradoxical phenomenon is the end-result of four inter-related developments. First, international criminal tribunals are constantly confronted with the gap that Jack Balkin identified between the ideals of justice, on the one hand, and the institutional and political realities in which they operate, on the other. They have been created to satisfy a longing for global accountability, redress for victims and fairness for accused, but in practice only part of the world is called to account, victims find little redress in international criminal proceedings[87] and accused fair trial rights suffer from the embrace of illiberal criminal doctrines.[88]The reality produced by tribunals created to serve international justice (necessarily) falls short of the ideal of justice.[89]

Secondly, the field of international criminal law by which we mean international criminal tribunals and international criminal law scholars, states, international organizations and non-governmental organizations promoting international criminal justice has responded to this harsh reality mostly by working on more international criminal law. With a view to overcoming the shortcomings, the field has argued for a wider personal and territorial jurisdiction of international criminal tribunals; more victim-oriented arrangements within international criminal law; and, to a lesser extent, more work on a fair procedure for the accused. International criminal law's limitations are thus neither accepted nor considered a reason to use less of it. Instead, the limitations are fought with attempts to have more and higher-quality international criminal law. Consequently, the search for justice is more and more institutionalized, and specifically, more and more tribunalized: international criminal tribunals are increasingly present and influential.[90]

The third development is that, partly as a consequence of this tribunalization, international criminal law has become an increasingly popular frame for defining issues of justice. The framing of political issues in terms of international criminal law already occurred before the spread of international tribunals, as is illustrated by the 'crime of apartheid'. However, with international tribunals enforcing the law,

[86] ibid.
[87] Sara Kendall and Sarah Nouwen 'Representation Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' [2013] (76) *Law & Contemporary Issues* 235-262 <https://www.jstor.org/stable/24244678 > accessed 22 April 2020
[88] Darryl Robinson 'The Identity Crisis of International Criminal Law' [2008] (2) *Leiden Journal of International Law* 925-963. < https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/the-identity-crisis-of-international-criminal-law/47836B8BE0B803C6DE8B79306A3906F6> accessed 22 April 2020.
[89] ibid.
[90] Thomas Skouteris 'The New Tribunalism: Strategies of (De) Legitimation in the Era of International Adjudication' [2006] (17) *Finnish Yearbook of International Law* 307-356. <https://www.aucegypt.edu/ar/node/3099> accessed 22 April 2020.

international criminal law has turned into an even more powerful frame to articulate injustices and to pursue political causes.

The Agreement on the Establishment of the Extraordinary African Chambers and the Statute of the Chambers

Since the 1970's, Africa was bedeviled by conflicts, it accounted for more than forty percent of the conflicts around the world, the highest on any continent. From the year 2000 to 2014, twenty-two peacekeeping operations by the international community took place throughout the world. Out of these, thirteen (13) took place on African soil.[91] Some African leaders have stayed in power for more than fifteen (15) years, thereby becoming dictators, oppressing their own peoples leading to civil wars with the resultant effect of peacekeeping. Some examples are, President Teodor Obiang Nguema Mbasago of Equatorial Guinea since 1979, Jose Santos of Angola, since 1979, Robert Mugabe of Zimbabwe since 1980,[92] Yoweri Museveni of Uganda since 1986. Others are Omar Bashir of Sudan since 1989, Pierre Nkurunziza of Burundi since 2005 and Idrissu Deby of Chad since 1990, whose fifth term in office just began.[93]

Added to this is President Yahya Jammeh of Gambia, who ruled this tiny West African country for 22 years and lost the election on 1st December 2016, initially conceding defeat but later changed his mind that he was not going to handover. It took the intervention of the Special West African Military Force, to eject him from Banjul Gambia and for the elected President, Adama Barrow who was earlier on sworn in nearby Senegal to assume office.[94] Much of African contemporary conflict is intrastate, exacerbated by ethnic and religious tension with generic economic and political underpinning, all as a result of bad governance. The growing interconnecting of the global arena also means that conflicts can have international as well domestic dimensions.[95]

[91]List of Peacekeeping Operations 1948-2014 <un.org/en/peacekeeping/resources/statistics.factsheet.html> accessed 15 March 2016.

[92] Note that President Robert Mugabe resigned from office on Tuesday 21 of November, 2017 after ruling the African country for about 37years, news monitored on Al Jazeera Network news on Tuesday 21 November, 2017. This was after a military junta putting under house and arrest and Zimbabwe Parliament threatened to impeach him.

[93]K.T. Oropo, 'As Nkurunziza Joins the League of Africa's Sit-tight Leaders, *The Guardian,* (Nigeria) (Lagos, May 10, 2015) 1; O. Babalola, 'No Retreat no Surrender for Mugabe at 93' The Punch (Nigeria) (Lagos, February 21, 2017) 11. In the case of Angola, an election was just held in August 2017, that brought an end to President Jose Santos rule of thirty-eight years, News monitored on *Nigerian Television Authority* on 23 August,2017 at 9 pm Nigerian Time.

[94] News monitored on *Nigerian Television Authority* (NTA) on 21 January, 2017 at 9:00 pm (Nigerian time),A Hanafi, 'Court Rejects Jammeh's Move to Stop President –elect's Inauguration'; *The Punch* (Nigeria) (Lagos: January 17th 2017)10; O. Aluko, 'Jammeh: Nigerian, Senegalese, Troops Set to Storm Gambia' *The Punch (*Nigeria) (Lagos: January 19th 2017)11. On 18 January 2017, on news monitored on *Aljazeera Network,* AU in a press release said they will not recognize Jammeh as the Gambian president as from 20th January,2017.

[95] Onyinye Onwuka, 'The ECOWAS Council of the Wise: An Indigenous Framework for Conflict Resolution' (2009) (2) *Africa Peace and Conflict Journal* 35-62.

Even in 2020, a presidential candidate in Guinea Bissau, Umaro Sissoco Embalo, swore himself as the new President of Guinea Bissau, while defying a bitter ongoing row about the outcome of the December 292019 elections.[96] It should be noted, that this is a potential trouble spot in both West Africa and Africa indeed that may lead to a conflict which may result into war, thus necessitating peacekeeping in future if necessary action is not urgently taken to curb it.

Driven by victims, supported by international human rights activist, Habre's trial is also cause for the international community to reflect significantly.[97] Ironically, it was the French and then particularly the US- the very people Habre railed at on hearing the verdict- who kept him on power in the first place. The US secretary of state, John Kerry, has acknowledged his country's complicity in Habre's crimes in stating,[98] 'as a country committed to the respect for human rights and the pursuit of justice, this is also an opportunity for the United States to reflect on, and learn from, our own connection with past events in Chad'. During the 1980s the Reagan administration identified Libya as a potential threat and was instrumental in bringing Habre to power. Then- CIA director William Casey and Secretary of state Alexander supported working with Habre to take control and this was then backed with training for the DDS and $182 million in economic and military assistance.[99]

This considerable support helped Chad expel Libyan forces and provided a useful ally for the US Donald Norland, the American ambassador to Chad from 1970 to 1981, told the Washington post in 2000,'the CIA was so deeply involved in bringing Habre to power I can't conceive they know what was going on'. The trial has enormous implications for human rights advocacy, particularly in terms of the role that survivors can play in holding abusers accountable.[100]

The Composition, Jurisdiction, and Powers of the EAC

Composition

The purpose for establishing the EAC is to implement the decision of the AU concerning the Republic of Senegal's prosecution of international crimes committed

[96] AFP, Guinea Bissau Candidate swears himself in as President despite vote row. <https://m.news24.com/Africa/News/guinea-bissau-candidate-swears-himself-in-as-president-despite-vote-row-20200227&hl=en-NG> accessed 29 February 2020.
[97] Lawrence P Jackson 'African Trial of Chadian Dictaor Habre is a Landmark Against Impunity'[2016] *The Conversation* <https://theconversation.com/african-trial-of-chadian-dictator-habre-is-a-landmark-against-impunity-60469> accessed 22 April 2020.
[98] ibid.
[99] ibid.
[100] Pierre Hazan 'The Trial of Hissene Habre: A Pivotal Case for International Justice in Africa' *The Conversation* <http://theconversation.com/the-trial-of-hisse-ne-habre-a-pivotal-case-for-international-justice-in-africa-61052> accessed 22 April 2020

in Chad between 7th June, 1982 and 1st December, 1990, in accordance with Senegal's international commitments.[101] It has four (4) Chambers, viz, Investigative Chamber,[102] Indicting Chamber,[103] Trial Chamber,[104] and Appeals Chamber[105] it also has power to prosecute and try the person or persons most responsible for crimes and serious violations of international law, customary international law, and international conventions ratified by Chad, committed in the territory of Chad during the period from 7th June, 1982 to 1st December, 1990.[106]

The EAC is composed of one (1) President, two (2) judges of Senegalese nationality and two (2) alternate judges of Senegalese nationals, who shall be nominated by the Senegalese Minister of Justice and appointed by the Chairperson of the AU, the President of the Chamber shall be a non-Senegalese judge from another AU member state.[107]

Jurisdiction

The crimes within the EAC are the crime of genocide,[108] crimes against humanity,[109] war crimes,[110] and torture.[111] The crimes against humanity are rape, sexual slavery, enforced prostitution, enforced sterilization or any other form of sexual violence of comparable gravity.[112] Others are murder, [113]extermination,[114] deportation,[115] crime of apartheid,[116] the enslavement or massive and systematic practice of summary executions, kidnapping, of persons followed by their enforced disappearance,[117] torture or inhumane acts intentionally causing great suffering or serious injury to body or to physical or mental health, on political, racial, national, ethnic, cultural, religious or gender grounds.[118]

On the other hand, war crimes are, murder,[119] torture, or inhumane treatment, including biological experiments, or willfully causing great physical or mental suffering,[120] extensive destruction and appropriation of poverty, not justified

[101] art 1 of the EAC.
[102] ibid art 1 (a).
[103] ibid art 1 (b).
[104] ibid art 1 (c).
[105] ibid art 1 (d).
[106] ibid art 3 (1).
[107] ibid art 11 (4).
[108] ibid art 4 (a).
[109] ibid art 4 (b).
[110] ibid art 4 (c).
[111] ibid art 4 (d).
[112] ibid art 6 (a).
[113] ibid art 6 (b).
[114] ibid art 6 (c).
[115] ibid art 6 (d).
[116] ibid art 6 (e).
[117] ibid art 6 (f).
[118] ibid art 6 (g).
[119] ibid art 7 (a).
[120] ibid art 7 (b).

by military necessity and carried out unlawfully and wantonly,[121] compelling a prisoner of war or other protected person to serve in the armed forces.[122] Other war crimes are, depriving a prisoner of war or other protected person of the rights or fair and regular trial,[123] unlawful deportation or transfer or unlawful confinement,[124] taking of hostages.[125] Added to this, the EAC also had jurisdiction to try persons who have committed serious violations of Common Article 3 of the Geneva Conventions of 12th August, 1949, and relating to the protection of Victims of Armed Conflicts and of the Second Additional Protocol to the Geneva Conventions of 12th August, 1949, and relating to the Protection of Victims of Non- International Armed Conflicts, of 8th June, 1977.[126] These violations include violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture mutilations or any other form of corporal punishment,[127] collective punishment,[128] taking of hostages.[129] Other war crimes are, acts of terrorism,[130] outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault,[131] pillage,[132] the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples[133] and threats to commit any of the foregoing acts.[134]

Powers

The EAC may impose one of the following penalties on a person. These are, imprisonment for a maximum of 30 years,[135] a term of life imprisonment, when justified by the extreme gravity of the crime and the individual circumstances of the convicted person,[136] in addition to imprisonment, the EAC may order,[137] a fine under the criteria provided for in Senegalese law,[138] a forfeiture of proceeds, property and assets derived directly or indirectly from the crimes, without prejudice to the rights

[121] ibid art 7 (c).
[122] ibid art 7 (d).
[123] ibid art 7 (e).
[124] ibid art 7 (f).
[125] ibid art 7 (g).
[126] ibid art 7 (2).
[127] ibid art 7 (2) (a).
[128] ibid art 7 (2) (b).
[129] ibid art 7 (2) (c).
[130] ibid art 7 (2) (d).
[131] ibid art 7 (2) (e).
[132] ibid art 7 (2) (f).
[133] ibid art 7 (2) (g).
[134] ibid art 7 (2) (h).
[135] ibid art 24 (a).
[136] ibid art 24 (b).
[137] ibid art 24 (2).
[138] ibid art 24 (2) (a).

of third parties acting in good faith.[139] The EAC convicted Habre, of crimes against humanity, war crimes and torture, and sentenced him to life imprisonment on 30th May 2016.[140]He was also convicted of raping one of the victims of his atrocities.[141] In 2017, the Appeal Chambers of the EAC confirmed the judgment against Hissene Habre. In the appeal, which confirmed his conviction for crimes against humanity, torture and war crimes, the Appeals Chamber also ordered Habré to pay compensation equivalent to more than USD 145 million to the victims of his crimes.[142]This is the largest amount of compensation awarded against a convicted person by an international criminal tribunal (ICT)[143]and, although significant for recognizing the vast harm suffered by Habré's victims, the award of such a huge sum presents a number of challenges, including how to finance the reparations awarded.

Some of the promotions of EAC in light of the difficulties in funding organs established to administer reparations at ICTs, this article analyses the law and practice of the EAC, from which, it argues, lessons can be learned for the permanent International Criminal Court(ICC). The article questions why the EAC prosecutor failed to charge Hissène Habré with the war crime of pillage, despite its inclusion in the EAC's constituent instrument and in view of the requirement that assets susceptible to orders for forfeiture be derived directly or indirectly from the crime(s) of which a person is found guilty. Furthermore, the article argues that, in situations similar to that of Habré, where an accused or convicted person possesses(or is able to access) significant assets, ICTs ought to place greater emphasis on fines and the forfeiture of assets so as to reduce their reliance on voluntary donations to meet the cost of reparations. Finally, the article identifies the substantial pressure on the EAC Trust Fund (Trust Fund) to implement reparation awards ordered against Habré in the absence of sufficient assets to meet the entire compensation awarded.

Assets belonging to convicted persons can be used to finance reparations awarded to the victims of international crimes.[144]As Diab put it, 'the unavailability of assets is

[139] ibid art 24 (2) (b).
[140] Girmachew A. Aneme and Ufuoma Lamikanra, Update: 'Introduction to the Norms and Institution of the African Union'< https://www.nyulawglobal.org/globalex/African_Union1.html> accessed 25 April 2020.
[141] Jamille Bigio and Rachel Vogelstein, 'Countering Sexual Violence in Conflicts', *Council on Foreign Relations* <https://www.cfr.org/sites/default/files/report_pdf/Discussion_Paper_Bigio_Vogelstein_Sexual_Violence_Conflict_OR_1.pdf> accessed 25 April 202.
[142]*The Prosecutor General v Hissein Habré* Appeals Chamber, 27 April 2017 (Appeal Judgment).
[143] ibid.
[144] On 24 March 2017, the International Criminal Court Trial Chamber II Issued an order for reparations against Germain Katanga, in which it found that, despite his indigence, he was liable for the sum of USD 1 million. See *Prosecutor v Germain Katanga*, order for reparations pursuant to article 75 of the statute (ICC-01/04-04/07-3728-tENG) 24 March 2017 (Order for Reparations), para 264. On 8 March 2018, this was confirmed by the Appeals Chamber; see Prosecutor v Germain Katanga, public redacted judgment on the appeals against the Order for Reparation (ICC-01/04-01/07-3778-Red) 8 March 2018, para 186.

probably the greatest challenge in funding court ordered reparations. Due to their nature as the product of a court ruling, the obligation to fund them rests on the convicted person and stems from his/her civil responsibility for the harm caused'.[145] Without such assets, trust funds established to implement reparations awards, among other tasks, may not realize their objectives. The ICC is illustrative in this regard because its Trust Fund for Victims (TFV) largely relies on voluntary donations to meet its objectives. The TFV regulations provide that the body shall be funded from four sources: voluntary contributions; proceeds collected through fines or orders for forfeiture; resources drawn from reparations awards; and other funds allocated by the Assembly of States Parties.[146]However, voluntary contributions are by no means reliable. For example, the TFV's financial statements for 2015 show that both voluntary contributions and, consequently, its fiscal surplus declined because of the financial pressure facing donors due to the arrival in Europe of large numbers of migrants and refugees.[147]Reflecting on the challenges facing the TFV, Sara Kendall accurately observes that its reliance on voluntary donations is exacerbated by 'its dual mandate of providing general assistance as well as dispensing court-ordered reparations following convictions',[148]rendering its finances particularly tenuous.

Like a limited number of victim-oriented ICTs,[149]the EAC has a reparations framework, pursuant to which compensation (reparations awards), among other measures, may be ordered directly against convicted persons. If the compensation is (partially) financed from the assets of the convicted person, the assets seized require no link to the crime(s) for which the person has been convicted.[150]Orders for fines against a convicted person also require no such evidential connection. Conversely, only those assets derived directly or indirectly from the crime(s) of which a person is found guilty are susceptible to orders for forfeiture, thereby excluding other assets that do not have such a link to the offences. Reparations mechanisms cannot operate

[145] This is explicitly recognized in art 79(2) of the Rome Statute of the International Criminal Court (ICC Statute): 'The Court may order money and other property collected through fines of forfeiture to be transferred, by order of the Court, to the Trust Fund.'

[146] Nader I Diab 'Challenges in the Implementation of the Reparation Award against Hissein Habré: Can the Spell of Unenforceable Awards across the Globe be Broken?' [2018] (16) *Journal of International Criminal Justice* 141 - 150.< https://academic.oup.com/jicj/advance-article/doi/10.1093/jicj/mqz039/5613006> accessed 22 April 2020. See also C Ferstman 'Cooperation and the International Criminal Court: the Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley J Birkett (eds) *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (Brill Nijhoff, 2016) 227 - 234. <https://www.cambridge.org/core/journals/journal-of-african-law/article/victims-justice-reparations-and-asset-forfeiture-at-the-extraordinary-african-chambers/908379A17D01F1B8CA0A3F2944EEE2AA> accessed 22 April 2020).

[147] ibid.

[148] ibid.

[149] Daley J. Birkett 'Victims' Justice? Reparations and Asset Forfeiture at the Extraordinary African Chambers' [2019] (63) *Journal of African Law* 153 – 156< https://www.cambridge.org/core> accessed 22 April 2020.

[150] ibid.

effectively without funds, nor, it is argued, should they be expected to bear this heavy burden in cases where a convicted person possesses substantial wealth.[151]

This trial of Habrè followed the footsteps of the extraordinary Chambers in the Courts of Cambodia (ECCC) established in 2006 to address the violence of the Khmer Rouge (KR).[152] Its mandate was to bring to justice those who were responsible for human rights abuses committed during the regime. For the government of Cambodia and Cambodians, the ECCC is also intended as a means of obtaining justice for human and humanitarian right abuses.[153]

Conclusion

The EAC is a landmark in the fight against impunity for atrocities, including crimes against humanity and sends a very powerful message to other perpetrators of mass atrocities, including current and former heads of state. The victims experienced significant obstacles over the 26 years of fighting but they persevered and agitated in Senegal and Belgium, at the UN Committee against Torture and the African Union. Eventually, with support from Belgium and Human Rights Watch, the ICC encouraged Senegal, with the support of the African Union, to hold a trial that came to a successful conclusion for the victims. It shows that African have the capacity and the will to enforce international justice and could open the door for African to deliver justice to more of their own leaders.[154]Other African despotic leaders should note that it is not business as usual, that their actions may be called into question after they have left office. It is not even necessary to allow any despotic African head of states to face the ICC; the EAC is in fact an African solution to African problem.

[151] ibid.

[152] Phuong N. Pham and others 'Perspectives on Memory, Forgiveness and Reconciliation in Cambodia's Post-Khmer Rouge Society', *International Review of the Red Cross* <https://international-review.icrc.org/sites/default/files/reviews-pdf/2019-12/irrc_101_910.pdf> accessed 22 April 2020).

[153]Alexander L. Hinton *The Justice Façade: Trials of Transition in Cambodia* (Oxford University Press, 2018) 58 <https://www.amazon.co.uk/Justice-Facade-Trials-Transition-Cambodia-ebook/dp/B07BH2SFTJ > accessed 22 April 2020.

[154]Adjovi ,(n 3) 1021.

KAMPALA INTERNATIONAL UNIVERSITY
LAW JOURNAL
KIULJ Vol.4 Issue 2,2022

ISSN: 2519-9501